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INSURANCE

I. Offset of Medical Payments Coverage Against Liability

For a relatively small additional premium, most automobile liability insurance policies now contain medical payments coverage in which the insurer agrees to advance an injured party's medical expenses within the specified limits. Many insurers include additional provisions within medical payments coverage which allow the insurer to become subrogated to the injured party's right of recovery against the tortfeasor.[1] In *Harrington v. Edwards*[2] the supreme court recently examined the novel issue of whether an insurer may credit or offset the amount of advanced medical payments against an injured party's settlement or recovery. Harrington, a guest-passenger, was injured in an automobile accident in which the insured driver was killed. In a subsequent suit against the administratrix of decedent's estate, Harrington recovered a verdict in the amount of $5,412.05.[3] Nationwide Mutual Insurance Company, the decedent's insurance carrier, had advanced Harrington $3,488.95 under the medical payments provision of its policy. Although Nationwide's policy required Harrington to execute a written agreement that any advances would be applied to offset any subsequent claim or recovery,[4] the company did not obtain such an agreement. Additionally, Nationwide's medical payments coverage contained a standard subrogation clause which purportedly gave the insurer the right to offset medical payments.[5]

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1. *See* Travelers Indem. Ins. Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965).

2. 262 S.C. 263, 203 S.E.2d 691 (1974).

3. The jury award represents the exact amount of Harrington's medical bills plus his lost wages. Brief for Appellant at 4.

4. The policy provision agreed to advance medical payments to any person injured in an accident involving the insured automobile

> [p]rovided that no such payment shall be made . . . unless the person to or for whom such payment is made shall have executed a written agreement that the amount of such payment shall be applied toward the settlement of any claim, or the satisfaction of any judgment for damages entered in his favor, against any person entitled to protection because of bodily injury . . . .

Record at 6-7.

5. The subrogation clause provided that

> [i]n the event of payment . . . of this endorsement . . . the Company shall be subrogated to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery which the injured person or anyone receiving such payment may have against any person

It was agreed and stipulated by counsel prior to trial that Nationwide would receive credit for any and all advance payments subject to the policy provisions relating to medical payments coverage. In return, Nationwide agreed not to object to the introduction into evidence of Harrington's medical bills. All parties agreed that $2,488.95 advanced to Harrington above the limits of Nationwide's medical payments coverage was a true advance and that the verdict, if any, would be reduced by that amount. The remaining $1,000 advancement was at issue. Nationwide claimed that its policy provisions allowed it to offset the full amount advanced. Harrington contended that he was a stranger to Nationwide's policy, was not bound by its subrogation provisions, and that the $1,000 could not be offset against a verdict under the policy's liability provisions. At pretrial, the parties agreed that the trial court should determine whether the verdict, if any, would be further reduced by the $1,000 amount.

After the jury verdict, the trial court refused to allow Nationwide to offset the advanced medical payment in issue because Harrington was not bound by the insurance contract or by a written agreement with Nationwide.[6] In a divided opinion, the supreme court reversed the trial court and allowed Nationwide to offset all its advances against the verdict. Justice Littlejohn, writing for the majority, noted that Nationwide's medical payments coverage was not required by statute and that the deceased driver had voluntarily purchased the coverage to benefit passengers in the insured automobile.[7] Harrington, therefore, was a third party beneficiary of the insurance contract whose recovery was limited to the amount stipulated in the contract provisions.[8]

In oral argument, Harrington's counsel conceded that Nationwide was under no obligation to advance medical payments unless Harrington agreed in writing that such advancements would be credited against ultimate recovery and that he would have been bound by his written agreement had he executed one.[9] As a result of these admissions, Justice Littlejohn narrowed the

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or organization and such person shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. Such person shall do nothing after loss to prejudice such rights.

Record at 7.

6. Record at 9-10.

7. 262 S.C. at 266, 203 S.E.2d at 692.

8. *Id.*

9. *Id.* at 267, 203 S.E.2d at 692-93.

issue of the appeal to the single question of whether Nationwide's waiver of the required written agreement also waived its right to offset. In answering the question in the negative, Justice Littlejohn relied upon his conception of the intent of the contracting parties.[10] Although Harrington was not a party to the contract, the terms of the contract indicate that the parties intended to condition his acceptance of medical payments on the insurer's right to offset.[11]

Justices Brailsford and Moss concurred in the result reached by Justice Littlejohn but maintained that the suit was not an action on the insurance contract. Instead, both viewed the controlling questions as "whether the administratrix is entitled to credit for the advance payment of plaintiff's medical expense."[12] Relying upon the Delaware Superior Court's opinion in *Yarrington v. Thornburg*,[13] both indicated that the administratrix could receive a credit for the advanced medical payments.[14] Since the deceased driver had created the fund from which the payments arose, his estate should be able to claim an advantage from the premiums paid to the insurer.[15] Since the estate earned the credit through the payment of premiums and would receive no windfall by its credit, the collateral source rule would not be violated and Harrington would be precluded from receiving a double recovery for his medical bills.[16]

Justice Bussey, with whom Justice Lewis concurred, dis-

10. *Id.* at 267-68, 203 S.E.2d at 693.

11. Brief for Appellant at 9.

12. 262 S.C. at 269, 203 S.E.2d at 693.

13. 205 A.2d 1 (Del. Sup. 1964). In *Yarrington* an automobile driver was sued by a guest-passenger to recover for injuries sustained in an accident. Despite the absence of any policy provisions requiring deduction of advance medical payments from damages recovered by the insured party, the court allowed the tortfeasor to credit the payments made by his insurer.

14. 262 S.C. at 269, 203 S.E.2d at 693.

15. *Id. See* Brief for Appellant at 12-13.

16. 262 S.C. at 269, 203 S.E.2d at 693. Justices Brailsford and Moss apparently would allow an injured party to obtain a double recovery for his medical bills in some circumstances where an insurer refused to comply with its contractual obligation to make medical payments after the injured party has recovered upon or settled his tort claim. In Moorman v. Nationwide Mut. Ins. Co., 207 Va. 244, 148 S.E.2d 874 (1966), the Virginia Supreme Court allowed a guest-passenger to recover medical expenses from the insurer after the guest-passenger had obtained a settlement with the insured. The court noted the absence of language in the policy which reduced or limited the insurer's liability under the medical payments coverage if recovery resulted from other policy provisions. Since the insurer agreed to assume a distinct and specific coverage under the medical coverage

sented,[17] emphasizing several troublesome facts which the other opinions ignore. Initially, Harrington received a verdict which was limited to the exact amount of his medical bills and lost wages. The size of the amount advanced by Nationwide prior to trial, however, creates the inference that Harrington sustained serious injuries in the accident.[18] Since no award for pain or suffering was evident, Justice Bussey concluded that the small amount of recovery "gives rise to the inference that the jury compromised the issue of liability by compensating Mr. Harrington only in part for his injuries and damage."[19] Additionally, no indication appears in the record to explain why Nationwide did not request a written agreement from Harrington before it advanced medical payments. The suspect nature of the insurer's actions convinced Justice Bussey that its waiver of a written agreement should also act as a waiver of the ability to credit or offset advanced payments against the verdict.[20]

The divergent opinions expressed by the supreme court in *Harrington* reflect the conflicting views adopted by other jurisdictions which have faced the identical issue. A number of jurisdictions have allowed insurers to credit disbursements under medical payment provisions against the damages to which an injured party is entitled on the grounds that the injured party should not be unjustly enriched by a double recovery on his medical bills.[21]

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provisions in return for an increased payment, the injured passenger could recover under the provisions which were viewed as similar to a personal accident policy. *See, e.g.*, Beschnett v. Farmers Equitable Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966); Severson v. Milwaukee Auto. Ins. Co., 264 Wis. 488, 61 N.W.2d 872 (1953). *Cf.* Blocker v. Sterling, 251 Md. 55, 246 A.2d 226 (1968). *See* Annot., 11 A.L.R.3d 1115 (1967).

17. 262 S.C. at 270-72, 203 S.E.2d at 694-95.

18. *Id.* at 270, 203 S.E.2d at 694.

19. *Id.*

20. Justice Bussey verbalized his suspicions and reasoning in the following manner:

> Nationwide's efforts to arrive at an adjustment favorable to it were . . . unsuccessful and it now asks this Court to restore it to the same position it would have occupied had it laid all of its cards on top of the table in dealing with Harrington and taken the written agreement in accordance with the proviso. I agree that each case should be determined on the basis of the policy provisions and the facts and circumstances involved. As I see it Nationwide clearly waived the proviso, deliberately making its own bed in which we should leave it lying.

262 S.C. at 271, 203 S.E.2d at 694.

21. *See, e.g.*, Chamberlain v. Shaver Transp. Co., 263 F. Supp. 47 (D. Ore. 1967); Adams v. Turner, 238 F. Supp. 643 (D.D.C. 1965); Cabellero v. Farmers Ins. Group, 10 Ariz. App. 61, 455 P.2d 1011 (1969); Yarrington v. Thornburg, 205 A.2d 1 (Del. Sup. 1964); Sims v. National Cas. Co., 171 So. 2d 399 (Fla. 1965) (dictum); Thompson v. Milan, 115 Ga. App. 396, 154 S.E.2d 721 (1967); Gunter v. Lord, 242 La. 943, 140 So. 2d 11 (1962); Hamilton v. Slover, 440 S.W.2d 947 (Mo. 1969); Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962); Chambers v. Pinson, 35 Ohio Op. 2d 163, 216 N.E.2d 394 (Ohio App. 1966).

A number of other jurisdictions allow the injured party a double recovery without crediting amounts advanced under medical payments coverage.[22] Such jurisdictions commonly view medical payment provisions as a separate accident insurance policy under which an injured party may seek a separate recovery; to hold otherwise would allow insurers to enrich themselves unjustly by charging two premiums but providing only a single benefit.[23] The conflicting views of the offset issue in other jurisdictions may largely be explained by the facts and circumstances of each particular case and the specific resolution each court determined to be equitable in light of those facts and circumstances.

The conflicting views in *Harrington* indicate that the issue of credit for medical payments may still be an open one in South Carolina. The result reached in that case, however, is arguably correct. Since the basic purpose of insurance is indemnification, double recovery for medical expenses is inconsistent. If an insured voluntarily elects to purchase medical payment coverage, his intention is to provide an injured party some minimal protection for medical expenses if no negligence is present. If the insured party is negligent, then the injured party is afforded full protection up to the liability limits of the policy.[24]

If credit for medical payments is allowed, care should be taken to insure that a jury's verdict truly reflects the damages sustained. Although the verdict in *Harrington* creates an inference of a compromise verdict,[25] the record does not indicate how Nationwide's claim for a credit may have influenced the verdict. To avoid prejudice, proper procedure would be a postjudgment motion for a credit toward satisfaction of the judgment. Such a procedure would shorten the trial and prevent interruptions with extraneous insurance matters.[26] If an injured party elects to sue for general damages only and makes no specific claim for medical

22. *See, e.g.*, Truitt v. Gaines, 199 F. Supp. 143 (D. Del. 1961) (applying Delaware law prior to Yarrington v. Thornburg, 205 A.2d 1 (Del. Sup. 1964)); Blocker v. Sterling, 251 Md. 55, 246 A.2d 226 (1968); Beschnett v. Farmers Equitable Ins. Co., 275 Minn. 328, 146 N.W.2d 861 (1966); Long v. Landy, 35 N.J. 44, 171 A.2d 1 (1961); Sparks v. Dalton, 458 S.W.2d 836 (Tex. Civ. App. 1970); Severson v. Milwaukee Auto. Ins. Co., 265 Wis. 488, 61 N.W.2d 872 (1953).

23. Brief for Respondent at 12, Harrington v. Edwards, 262 S.C. 263, 203 S.E.2d 691 (1974).

24. *See* Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

25. *See* text accompanying notes 18-19 *supra*.

26. *See* Chambers v. Pinson, 35 Ohio Op. 2d 163, 216 N.E.2d 394 (Ohio App. 1966).

expenses, then a postjudgment motion for credit should be denied.

II. CANCELLATION BY SUBSTITUTION

Cancellation of a policy of insurance arises from a variety of sources.[27] A number of older cases support the proposition that, when an insured unilaterally secures other insurance covering the same property, he has cancelled the existing policy by substituting another.[28] In *McCormack v. Equitable Fire Insurance Co.*[29] the South Carolina Supreme Court apparently adopted the rule of cancellation by substitution. In *Emmanuel Baptist Church v. Southern Mutual Church Insurance Co.*[30] the court questioned the soundness of the *McCormack* rule but declined to offer an alternative.[31] Instead, the court was content to distinguish *McCormack* by noting that the insured in *Emmanuel* intended to

27. Cancellation of insurance policies may be affected by statutory provisions, the terms and stipulations of the insurance contract, the mutual consent or acquiescence of the parties, the existence of fraud or misrepresentation, and the insolvency or dissolution of the insurance company. *See generally* 43 AM. JUR. 2d *Insurance* §§ 397 *et seq.* (1969).

28. *See, e.g.*, Wells Petroleum Co. v. Fidelty-Phoenix Fire Ins. Co., 121 F. Supp. 739 (D. Ill. 1954); Strauss v. Dubuque Fire & Marine Ins. Co., 132 Cal. App. 283, 22 P.2d 582 (1933); Bache v. Great Lakes Ins. Co., 151 Wash. 494, 276 P. 549 (1929).

29. 102 S.C. 473, 86 S.E. 1059 (1915). The insured purchased fire insurance through an agent who represented several insurance companies. The first insurer asked to be relieved of its risk and the agent issued a second fire insurance policy to the insured who immediately returned the original policy. The second insurer, Equitable Fire Insurance Company, decided to cancel its policy and notified the agent. The agent thereupon simultaneously issued a third policy in Fidelity-Phoenix Fire Insurance Company and requested immediate return of Equitable's policy which remained in effect 5 days after the notice of cancellation. Before the elapse of the required 5 days, fire destroyed the insured premises. Consequently, the insured held two fire insurance policies, both of which were in effect. Since both companies could not be liable for the loss, the court held that the insured compromised his claim against Equitable by releasing Fidelity-Phoenix prior to trial. This reasoning was based on the assumption that the third insurance policy was meant as a substitute for the second one.

30. 259 S.C. 223, 191 S.E.2d 255 (1972). Southern Mutual was the original insurer of the church. After extensive additions to the church buildings, Southern accepted a limited increase in its coverage. While further expansion was underway, Southern indicated an unwillingness to expand its coverage further. The church subsequently obtained additional insurance coverage from Nationwide Mutual Fire Insurance Co. Since the church facilities were grossly underinsured, the church was in the process of negotiating a multiperil policy with Nationwide in addition to its current coverage. This was accomplished by an oral binder one day before the insured premises sustained a fire loss. The first insurer, Southern, contended that Nationwide's policy was a substitution which effected a voluntary cancellation of their coverage and denied liability.

31. *Id.* at 231, 191 S.E.2d at 258.

obtain additional, rather than substitute insurance coverage.[32]

In *Tyner v. Cherokee Insurance Co.*[33] the court rejected the older rule and announced that "the mere procuring of a policy of insurance with the intent that it should be substituted for an existing policy does not effect a cancellation of the existing policy, unless such substitution is accepted by both the insured and the insurer."[34] In *Tyner* the insured owned a building in Charleston which was insured by Old Charleston Company, Ltd., for a 3-year term. Before the expiration of the 3-year period, the insured secured another policy issued by Cherokee Insurance Company covering the same premises. Although the insured intended to substitute Cherokee's policy for that of Old Charleston, neither company knew of the other's policy and both considered its own policy in effect. The insured premises were severely damaged by fire and the insured subsequently brought an action against both insurers to recover the loss.

The trial court held that both policies were in effect and that the loss should be prorated between the insurers in proportion to the amount of coverage afforded by their respective policies. In affirming the lower court, the supreme court recognized that cancellation of an insurance policy by a method different from that set forth in the policy requires mutual assent.[35]

> Whether cancellation by mutual agreement has been effected depends on the intention of the parties as evidenced by their acts, conduct and words, taken in connection with the attendant circumstances. There must be a meeting of minds, or mutual assent, to constitute a valid cancellation, and each party must act with knowledge of the material facts.[36]

Consequently, the court felt that the sounder rule was that cancellation of an insurance policy by substitution should similarly be based upon mutual assent and may not be unilaterally effected

32. *Id.*

33. 262 S.C. 462, 205 S.E.2d 380 (1974).

34. *Id.* at 465, 205 S.E.2d at 381.

35. *Id.* at 466, 205 S.E.2d at 381. *See* Lundy v. Lititz Mut. Ins. Co., 232 S.C. 1, 100 S.E.2d 544 (1957); Dell v. Lumbermen's Mut. Ins. Co., 213 S.C. 593, 50 S.E.2d 923 (1948).

36. 262 S.C. at 465, 205 S.E.2d at 381, *quoting* Dill v. Lumbermen's Mut. Ins. Co., 213 S.C. 593, 600, 50 S.E.2d 923, 926 (1948). In *Dill*, the policy provisions allowed either the insured or the insurer the right to cancel the contract of insurance upon proper notice to the other party and without the other party's consent. The specific issue involved in *Dill* was whether the policy terms constituted the exclusive method of cancellation.

unless the policy provisions otherwise allow.[37]

In rejecting, sub silentio,[38] the rule of substitution found in *McCormack*, the court adopted a position in accord with a growing number of states.[39] The requirement of mutual consent to effect cancellation is consistent with the principles of contract law.

> It comes to this—an insurance policy is a contract; a contract may be . . . terminated in accordance with the provisions thereof or by *mutual consent*, a meeting of the minds, but one of the parties may not terminate it without the assent of the other unless the contract so provides.[40]

Not only does the mutual assent rule comport with basic contract principles, it also obviates the necessity for trial courts to delve into and determine the uncommunicated intent of insureds who hold dual policy coverage. In requiring the insurer to contribute a prorated share of the loss, an entirely equitable result is reached.[41]

III. SOUTH CAROLINA RETALIATORY STATUTE

Most states have a retaliatory statute which protects domestic insurers within the state and insures fair treatment of domestic insurers in other states.[42] Such statutes create a quasi-tariff around the borders of the taxing state and establish a price of

37. 262 S.C. at 465, 205 S.E.2d at 381.

38. The court in *Tyner* never mentioned the *McCormack* decision.

39. The substitution rule has been repudiated or rejected by several states in the past decade. *See, e.g.*, National Investors Fire & Cas. Ins. Co. v. Pacific Indem. Co., 359 F.2d 203 (10th Cir. 1966); Mutual Creamery Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 294 F. Supp. 337 (D. Minn. 1969); Northern Ins. Co. v. Mabry, 4 Ariz. App. 217, 419 P.2d 347 (1966); Glens Falls Ins. Co. v. Founders' Ins. Co., 209 Cal. App. 2d 157, 25 Cal. Rptr. 753 (1962); M.F.A. Mut. Ins. Co. v. Southwest Baptist College, Inc., 381 S.W.2d 797 (Mo. 1964); New Hampshire Ins. Co. v. Cruise Shops, Inc., 67 Misc. 2d 60, 323 N.Y.S.2d 352 (1971); Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130 S.E.2d 311 (1963); Scheel v. German-American Ins. Co., 228 Pa. 44, 76 A. 507 (1910).

40. Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 188, 130 S.E.2d 311, 316 (1963).

41. The result of *McCormack* may still be possible where an insured elects to release, waive, or otherwise terminate a portion of his insurance coverage after loss occurs, the loss falling upon the insured *pro tanto*. *See* Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. at 189, 130 S.E.2d at 317.

42. Note, *A Review of Retaliatory Laws*, 6 S.C.L.Q. 221 (1953-54). Retaliatory statutes have existed for over one hundred years with the New Hampshire statute of 1852 being the first. *See* Haverhill Ins. Co. v. Prescott, 42 N.H. 547, 80 Am. Dec. 123 (1861).

admission for foreign insurers seeking to transact business within the state.[43] Retaliatory legislation is a misnomer since "the so-called retaliatory clauses in insurance statutes are . . . based upon principles of 'comity,' and are designed to create substantial equality of burdens upon foreign and domestic corporations."[44] To encourage equality, foreign insurers doing business within the taxing state face the same tax burden as domestic insurers doing business in the foreign state.[45] Since retaliatory statutes are recognized as penal in nature, they are strictly construed.[46]

The South Carolina Retaliatory Act is typical of many such statutes and provides that

> [w]henever the laws of any other state of the United States shall require of insurance companies chartered by this State and having agencies in such other state, or of the agents thereof, any deposit of securities in such state for the protection of policyholders or otherwise or any payment of penalties, certificates of authority, license fees or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this State, all such similar companies of such states establishing or having theretofore established an agency or agencies in this State shall make the same deposit for a like purpose with the Commissioner and pay to the Commissioner, for penalties, certificates of authority, license fees, filing fees or any other fees, an amount equal to the amount of such charges imposed by the laws of such state upon companies of this state and the agencies thereof.
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> Whenever the laws of any other state of the United States or the regulation or action of any public official of such other state shall subject insurance companies chartered by this State to any restrictions, obligations, conditions or penalties for the privilege of doing business in such other state which are greater than those required of similar insurers organized or domiciled in such other state by or in this State for the privilege of doing business herein, then all similar insurers organized or domiciled in such other state shall be subjected to such greater requirements imposed by or in such other state upon similar insurers of this State. *Provided, however,* that all license fees and

43. 6 S.C.L.Q. at 221.

44. Employers Cas. Co. v. Hobbs, 152 Kan. 815, 107 P.2d 715 (1941). *Contra,* State *ex rel.* Attorney General v. Fidelity & Cas. Ins. Co., 49 Ohio St. 440, 31 N.E. 658 (1892).

45. Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972).

46. *Id.*

charges made pursuant to this section shall be reduced to the extent of investment credits granted by §§ 37-123 and 37-125.[47]

In *Lindsay v. National Old Line Insurance Co.*[48] the supreme court held that a foreign insurer doing business in South Carolina could not reduce its total tax liability with the use of investment credits which the statute made otherwise available. National was a foreign insurer, incorporated under Arkansas law, which was licensed to do business in South Carolina. Under the applicable Arkansas statute,[49] a South Carolina insurance company would be taxed in the fixed amount of 2-½ percent of gross income for the privilege of doing business in Arkansas. In South Carolina, all foreign insurers are taxed at a rate of 1 percent of total net

47. S.C. CODE ANN. § 37-132 (Cum. Supp. 1974), *as amended*, No. 1555, [1972] S.C. Acts & Jt. Res. 3025. The 1972 amendment added the proviso to the second paragraph of the statute. The remainder of the second paragraph had previously been added in 1971. *See* No. 128, [1971] S.C. Acts & Jt. Res. 102.

48. 262 S.C. 621, 207 S.E.2d 75 (1974).

49. ARK. STAT. ANN. § 66-2302 (1966) provides in part:

(1) Each authorized foreign or alien insurer, and each formerly authorized foreign or alien insurer with respect to premiums so received while an authorized insurer in this State, shall file with the Commissioner on or before March 1 each year a report in form as prescribed by the Commissioner showing . . . total direct premium income including policy, membership and other fees, and all other considerations for insurance, from all kinds and classes of insurance, whether designated as premium or otherwise, received by it during the preceding calendar year on account of policies and contracts covering property subjects, or risks located, resident, or to be performed in this State (with proper proportionate allocation of premium as to such persons, property, subjects, or risks in this State insured under policies or contracts covering persons, property, subjects, or risks located or resident in more than one state), after deducting from such total direct premium income dividends and similar returns paid or credited to policyholders other than as to life insurance, applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, and the amount of reduction in or refund of premiums allowed to industrial life policyholders for payment of premiums direct to an office of the insurer. No deduction shall be made of the cash surrender values of policies. Considerations received on annuity contracts shall not be included in total direct premium income and shall not be subject to tax.

(2) Coincident with the filing of such tax report each such insurer shall pay to the State Treasurer through the Commissioner, as a tax imposed for the privilege of transacting business in this State, a tax upon such net premiums and net considerations, such tax to be computed thereon at the following rates:

(a) As to life insurance and disability insurance, the tax rate shall be two and one-half (2½%) per cent.

(b) As to all other kinds of insurance the rate of tax shall be two (2%) per cent . . . .

Arkansas law does not provide for any reduction in tax liability as a result of investment credits. *See* text accompanying note 47 *supra*.

income[50] plus an additional license fee amounting to 2 percent of the total net premiums collected in the state.[51] The maximum 3 percent tax rate on net premium income, however, can be reduced according to the amount of investment credits the foreign insurer allows to remain within the state.[52] National had rein-

50. S.C. CODE ANN. § 37-128 (1962) provides:
The Commissioner shall require all insurance companies not incorporated under the laws of this State but doing business in this State, including all domesticated companies and all other companies of any class licensed by such Commissioner other than domestic companies, to pay, in addition to the annual license fees otherwise provided by law, a graduated license fee in an amount equal to one percent of the total premiums collected in the State, less return premiums on risks and less dividends paid or credited to policyholders. But a mutual fire insurance company of another state, admitted to do business in this State, employing no agents, writing no business except on the property of its members and doing business without profit, shall pay annually on or before the first day of March, in lieu of the fee provided for in the preceding sentence but in addition to all other license fees which it is required by law to pay, a graduated annual license fee in an amount equal to one per cent of the premiums and premium deposits and assessments collected by it in the State during the year ending on the thirty-first day of December next preceding, after deducting from such premiums and premium deposits and assessments the so-called dividends or unused or unabsorbed portion of the premiums and premium deposits and assessments applied or credited in part payment of such premiums or premium deposits and assessments or returned to policyholders in cash or otherwise during the year for which the tax is computed. For the purposes of this section premiums shall not include considerations received for annuity contracts.

51. *Id.* S.C. CODE ANN. § 37-122 (1962) provides:
In addition to other annual license fees provided by law the Commissioner shall require each life insurance company of any class licensed by him, not incorporated under the laws of this State, to pay as an additional and graded license fee an amount equal to two per cent on the total premiums, that is, total premium income or total premium receipts from the State, less any dividend or bonuses paid in cash or applied in abatement of premiums or credited to policyholders of such company as collected from citizens of or residents of this State during the time the company has done business in this State since making the last return for such license fee. For the purposes of this section premiums shall not include considerations received for annuity contracts.

52. *Id.* S.C. CODE ANN. § 37-123 (1962) provides:
If the executive officer making a return for a company required to pay the additional fee provided by § 37-122 shall file with the Commissioner a sworn statement showing that at least one fourth of the reserve on all policies issued in this State is invested in any or all of the following securities or property, to wit, (a) notes or bonds of this State or of counties or municipalities of this State of subdivisions thereof, (b) first mortgage bonds of real estate in this State or first mortgage bonds of solvent domestic or domesticated corporations whose improved property is situate entirely within this State and which are owned and controlled independently of foreign corporations and operated entirely within the State, (c) average daily balance on deposits in banks of this State maintained continuously for twelve months next preceding the date of the return or

vested three-fourths of its reserves within South Carolina and apparently qualified for a reduced license fee of 1¼ percent, making its total liability only 2¼ percent of its net income.

National paid what it believed to be its tax liability under the retaliatory and licensing statutes. The insurance commissioner took the position that National, a foreign insurer, must pay an additional ¼ percent of its gross premium income to satisfy the requirements of the retaliatory statute. The commissioner obviously felt that National should pay to South Carolina the same amount that a South Carolina insurer doing business in Arkansas would be required to pay. National relied upon opinions of the South Carolina Attorney General[53] which indicated that it could take advantage of its investment credits to affect tax liability despite higher tax rates in the state of its incorporation and refused the commissioner's demand for an additional payment. After National's refusal to pay the additional tax, the commissioner filed suit to obtain a declaratory judgment as to the correct application of the retaliatory statute.

The commissioner moved for summary judgment before trial, claiming that no genuine issue existed as to any material fact.[54] National argued that the 1972 amendment[55] to the retaliatory statute permitting foreign insurers to reduce their license fees with investment credits was intended to be retroactive in application. The specific wording of the enactment tends to support National's assertion and demonstrate legislative intent that the amended statute should be retroactively applied:

> (A) Section 37-132, Code of Laws of South Carolina, 1962, as amended, be and the same is hereby further amended by adding at the end thereof the following: "*Provided, However*, that all license fees and charges made pursuant to this Section

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(d) any property situate within the State and returned for taxes therein, at the value at which it is returned, then the additional license fee on premiums collected during the time such investments have been actually made and maintained shall be one and three fourths per cent. Under like conditions if such investment be one half of such reserve, the additional license fee shall be one and one half per cent. Under like conditions if such investment be three fourths of such reserve, the additional license fee shall be one and one fourth per cent. And if the entire reserve be so invested, under like conditions, the additional license fee on such premium receipts shall be one per cent.

53. *See* 1965-66 Op. Att'y Gen. 116; 1964-65 Op. Att'y Gen. 163.

54. *See* S.C. Cir. Ct. R. 44. National conceded that it was proper to require payment of its license fee on the basis of gross income.

55. *See* note 47 *supra*, and text accompanying note 56 *infra*.

shall be reduced to the extent of investment credits granted by Sections 37-123 and 37-125, Code of Laws of South Carolina, 1962."

(B) *This enactment is declared to be declaratory of the existing provisions of Section 37-132.*[56]

The trial court granted the commissioner's motion for summary judgment and ruled that the 1972 amendment must be applied retrospectively. A majority of the supreme court, affirming the lower court, agreed with the lower court that its recent decision in *Lindsay v. Southern Farm Bureau Casualty Insurance Co.*[57] was controlling. In *Southern Farm* the same majority held that foreign insurers doing business in South Carolina who qualify for investment credits are still subject to the provisions of the retaliatory statute. The factual situations in *Southern Farm* and *National Old Line* are virtually identical,[58] except that the former decision was based upon the pre-1972 provisions of the retaliatory statute.[59] Consequently, the *Southern Farm* court ruled that the retaliatory insurance law should not be construed so as to defeat its basic purpose:

> If similar investment credit is authorized by the foreign State, then South Carolina could not retaliate since the taxes imposed by the foreign State on a South Carolina insurer would not be greater than the taxes imposed by South Carolina on the foreign insurer. If similar investment credit is not authorized by the foreign State, then . . . South Carolina must retaliate since the taxes imposed by the foreign State on a South Carolina insurer are greater than the taxes imposed by South Carolina on the foreign insurer.[60]

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56. No. 1555, [1972] S.C. Acts & Jt. Res. 3025 (emphasis added).

57. 258 S.C. 272, 188 S.E.2d 374 (1972).

58. In *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, a Mississippi insurance corporation was doing business in South Carolina. The applicable Mississippi law imposed a 3 percent tax on South Carolina insurers transacting business in Mississippi and made no provision for reduction in that amount as a result of investments in Mississippi securities. Although Southern Farm had made substantial investments in South Carolina securities and would normally have been entitled to an investment credit, the supreme court strictly construed the retaliatory statute, noted the absence of any language indicating legislative intent to allow reduction of tax liability below that imposed on South Carolina insurers in foreign states, and held that Southern Farm must pay an amount equal to that which a South Carolina insurer must pay in Mississippi.

59. *See* note 47 *supra*.

60. Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 277-78, 188 S.E.2d 374, 376 (1972).

The court in *National Old Line* asserted the same rationale to conclude that South Carolina must retaliate against the higher Arkansas taxes.[61]

After the court's decision in *Southern Farm*, the General Assembly acted with some dispatch[62] and amended the retaliatory statute[63] to allow investments in South Carolina securities to be credited after the retaliatory feature of the statute had been employed. In holding that this amendment was prospective only, despite the enactment's contrary language,[64] the *National Old Line* court, citing the trial judge, observed that

> the law is settled by the 1972 decision [*Lindsay v. Southern Farm Bureau Casualty Insurance Co.*] until such decision is reversed or modified . . . . [T]he provision in the 1972 amendment that it "is declared to be declaratory of the existing provisions of Section 37-132" is a legislative attempt to reverse a decision of the Supreme Court. In effect, the General Assembly has said as to Lindsay vs. Southern Farm Bureau Casualty Insurance Company, "We reverse." Under our State Constitution which provides in Section 14 of Article I for the separation of the legislative, executive and judicial powers of government, the General Assembly does not have the authority to do this. Consequently, the 1972 amendment is to be given prospective effect only.[65]

The court did not controvert the Legislature's plenary power to amend the retaliatory statute;[66] it merely recognized that "a judicial interpretation of a statute is determinative of its meaning

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61. The National Old Line court used language similar to that of *Southern Farm* to reach this result:

> If similar investment credit is not authorized by the foreign state, then South Carolina must retaliate since the taxes imposed by a foreign state on a South Carolina insurer are greater than the taxes imposed by South Carolina on the foreign insurer. We think the trial judge properly . . . [required] the insurance company to pay an additional amount to the Commissioner so that it will pay the same amount which a South Carolina insurer is required to pay to the State of Arkansas.

262 S.C. at 627, 207 S.E.2d at 77.

62. The court's decision in *Southern Farm* was filed on April 24, 1972, and the governor signed the amendment to the retaliatory statute approximately three months later on July 14, 1972.

63. *See* note 47 *supra*.

64. *See* text accompanying note 56 *supra*.

65. 262 S.C. at 628, 207 S.E.2d at 77-78.

66. *Id.* at 628, 207 S.E.2d at 78. *See* Boatwright v. McElmurray, 247 S.C. 199, 146 S.E.2d 716 (1966).

and effect" until subsequently amended by legislative enactment.[67]

Justices Brailsford and Bussey dissented,[68] claiming that the 1972 amendment to the retaliatory statute should be given retroactive effect. The dissent conceded that the amendment's declaratory language could not be given effect as a construction of the pre-amendment retaliatory statute in the face of the court's prior decision.[69] Instead, the dissent argued that the 1972 amendment authorized retrospective *calculation* of license taxes for years prior to its adoption.[70] By construing the amendment as expressing legislative intent to remit a portion of the taxes due under the retaliatory statute, the dissent concluded that no constitutional mandate concerning the separation of legislative and judicial powers would be violated.[71] Although the dissent correctly noted that *Southern Farm* did not prevent the General Assembly from enacting a rebate or remittance of prior taxes, the language of the enactment clearly does not call for such a remittance. The swiftness with which the Legislature acted[72] and the declaratory language of the enactment[73] make it manifest that the General Assembly intended to reverse the court's decision in *Southern Farm*. Moreover, the retaliatory statute and its subsequent amendment should have been strictly construed.[74] The dissent tacitly admits that its construction of the amendment is strained when admitting that the declaratory language of the enactment was "inappropriate."[75]

67. 262 S.C. at 629, 207 S.E.2d at 78. *Accord*, McCutcheon v. Smith, 199 Ga. 685, 35 S.E.2d 144 (1945). In *McCutcheon*, the petitioner brought an action to obtain civil service status from Fulton County authorities after her discharge as a county employee. The court had determined that, on the effective date of the Georgia Civil Service Act, the petitioner was not an employee under the Act and could not be accorded the status of an incumbent. The Georgia Legislature subsequently passed an act purporting to amend the Civil Service Act by declaring that the named petitioner was entitled to such status. The Georgia Supreme Court concluded that the special legislation was a legislative attempt to construe its former act and, consequently, an attempt by the Legislature to perform a judicial function.

68. 262 S.C. 621, 629-30, 207 S.E.2d 75, 78-79 (1974).

69. *Id.* at 630, 207 S.E.2d at 78.

70. *Id.*

71. *Id.* at 630, 207 S.E.2d at 78-79.

72. *See* note 62 *supra*.

73. *See* text accompanying note 56 *supra*.

74. *See* text accompanying note 46 *supra*.

75. 262 S.C. at 630, 207 S.E.2d at 78.

The willingness of the dissent to strain construction of the enactment to allow National a lesser tax burden is consistent with the dissenters' opinion in *Southern Farm*. In the 1972 decision, both Justices Brailsford and Bussey were convinced that the credit allowances enacted by the Legislature[76] were essential to the favorable position which South Carolina securities enjoyed on the bond market and that the majority's interpretation of the retaliatory statute would be harmful to such position.[77] Regardless of the correctness or incorrectness of this view,[78] the dissent in *National Old Line* has read too much into the 1972 amendment of the retaliatory statute. If the Legislature had intended to enact a remittance, it should have done so in plain terms.[79]

IV. POLICY PROVISIONS

A. *Replacement Vehicle*

As a practical matter, automobile liability insurance is a

76. S.C. CODE ANN. §§ 37-123 (Cum. Supp. 1973) and 37-125 (1962). *See* notes 51-52 *supra*.

77. Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 281-82, 188 S.E.2d 374, 378 (1972). The dissent argued that the objectives of the retaliatory statute and the investment credit statutes should be given equal effect. They suggested a proper reading of the retaliatory statute would be as follows:

> The burden imposed upon South Carolina insurance companies in Mississippi is exactly the same as that imposed upon Mississippi companies in this State, *i.e.*, a tax or license fee equal to 3% of the premiums collected within the State. This meets the equality "license fees" demanded by the retaliatory statute. That South Carolina sees fit, in furtherance of an entirely different policy, to allow a Mississippi company the opportunity to earn a credit against this tax by making South Carolina investments does not result in inequality within the meaning of the retaliatory statute. Surely it is not South Carolina policy to induce all states to allow investment tax credit to foreign insurance companies equivalent to that allowed here. If this should come to pass, the competitive advantage which we now enjoy in marketing bonds would inevitably vanish.

Id. But see Republic Ins. Co. v. Commissioner of Taxation, 272 Minn. 325, 138 N.W.2d 776 (1965).

78. In *Southern Farm* the insurance company admitted that the creation of good will and the necessity for diversification were also considerations dictating investment of reserves in the states in which it did business. Brief for Appellant at 13, Lindsay v. Southern Farm Bureau Cas. Ins. Co., 258 S.C. 272, 188 S.E.2d 374 (1972). Moreover, 82 percent of foreign insurance investments in South Carolina are made by insurers whose domiciliary states tax South Carolina corporations at a rate equivalent or lower than the South Carolina rates and would not be affected by the decision. 258 S.C. at 279, 188 S.E.2d at 377. Of the remaining foreign insurers, most would still be encouraged to invest up to 75 percent of their reserves in South Carolina securities.

79. *See* State v. Life Ins. Co. of Ga., 254 S.C. 286, 175 S.E.2d 203 (1970).

system of insuring vehicles rather than drivers.[80] Coverage of the basic automobile insurance policy centers around a named vehicle. Omnibus clauses[81] often expand coverage to include use of the named automobile by other persons in specified circumstances.[82] To the extent that insurance coverage under "newly acquired automobile" clauses expand coverage to named insureds while driving other automobiles, automobile insurance policies also insure persons. In *Stonewall Insurance Co. v. Richardson*[83] and *Allstate Insurance Co. v. Government Employees Insurance Co.*[84] the South Carolina Supreme Court interpreted similar policy provisions expanding insurance coverage to named insureds driving newly acquired automobiles.

In *Stonewall* the insurer brought an action to determine the extent of its liability under an automobile insurance policy. The policy in question was a standard form policy issued to Gerald Richardson as the named insured and covered a described 1967 Chevrolet Camaro automobile. The policy contained the usual provision that excluded coverage of any other vehicles owned by or furnished for the regular use of the named insured.[85] One provision[86] did, however, extend coverage to a newly acquired automo-

80. R. KEETON, BASIC TEXT ON INSURANCE LAW § 4.9(b) (1971).

81. The omnibus clause usually appears in the "persons insured" or "definition of insured" provisions of a policy. Regardless of where the clause is placed, its effect is to expand coverage to persons driving the named automobile with the permission or implied consent of the named insured. *Id.* § 4.7(a).

82. *Id.* § 4.9(b).

83. 261 S.C. 595, 201 S.E.2d 743 (1974).

84. 262 S.C. 110, 202 S.E.2d 640 (1974).

85. The applicable provision provided:

V. Use of Other Automobiles . . . .

. . . .

(c) This insuring agreement does not apply:

(1) to any automobile owned by or furnished for regular use to either the named insured or a member of the same household other than a private chauffeur or domestic servant of such named insured or spouse;

(2) to any accident arising out of the operation of an automobile sales agency, repair shop, service station, storage garage or public parking place;

(3) to any automobile while used in a business or occupation of such named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, private chauffeur or domestic servant.

Record at 31-32, Stonewall Ins. Co. v. Richardson, 261 S.C. 595, 201 S.E.2d 743 (1974).

86. The policy provision read:

(4) Newly Acquired Automobile—an automobile, ownership of which is ac-

bile if it *replaced* the automobile specifically described in the policy. In February 1968, the insured's automobile was involved in a collision and rendered inoperable.[87] Although the insured retained title to the wrecked automobile in his name and continued payments on it,[88] the insured purchased a 1962 Ford Falcon automobile which was involved in another accident in April 1968.[89] The insurer denied coverage, claiming that the policy covered only the Camaro automobile over which the insured continued to exercise rights of ownership, including the right of immediate possession.[90]

In rejecting the insurer's claim that retained ownership and replacement are mutually exclusive terms, the lower court found that

> [t]he evidence in this case clearly supports the fact that the 1962 Ford Falcon was a replacement vehicle for the wrecked 1967 Chevrolet. The fact that Richardson retained title and even made further payments on the car is not significant. If he had owed nothing on the 1967 Chevrolet and it was a total loss as he seemed to think, he may have retained title and ownership permanently because it had no sale or salvage value. This should not affect a vehicle obtained as a replacement.[91]

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quired by the named insured or his spouse if a resident of the same household, if (i) it replaces an automobile owned by either and covered by this policy, or the company insures all automobiles owned by the named insured and such spouse on the date of its delivery, and (ii) the named insured or such spouse notifies the company within thirty days following such delivery date; but such notice is not acquired if the newly acquired automobile replaces an owned automobile covered by this policy. The insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured or such spouse has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

Record at 31.

87. The parties stipulated: "That from the date of the accident in February 1968 until June 11, 1968, when the said Chevrolet was repossessed by General Motors Acceptance Corporation, the said Chevrolet was not used by Gerald Richardson and on April 21, 1968, it was inoperable." Record at 9.

88. Richardson was negotiating with his collision carrier as to whether he should have the Camaro repaired. Brief for Appellant at 3. *See also* Record at 25-28.

89. During the pendency of the present suit, tort actions arising out of the second accident were reduced to judgment against the named insured. These judgment creditors were made parties to the suit. Brief for Appellant at 2.

90. Brief for Appellant at 6. The insurer claimed that the insured was required to give the company notice within 30 days for the Falcon to be covered under the "newly acquired automobile" clause of its policy. *See* note 85 *supra*.

91. Record at 34.

The supreme court affirmed the lower court decision without significant comment.[92] In so doing, the court left unanswered the question of exactly what constitutes a replacement vehicle and whether retention of title to a wrecked automobile which has significant salvage value precludes coverage of a newly acquired automobile when notice requirements are not satisfied.

In *Allstate* the supreme court was faced with a factual situation similar to that in *Stonewall*. Government Employees issued a policy of automobile liability insurance to the named insured covering a 1961 Chevrolet automobile. The policy contained a provision which automatically extended coverage to any subsequently acquired replacement vehicle. A replacement vehicle was defined as

> a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided
>
> (1) it replaces an owned vehicle as defined in (a) above, or
>
> (2) the company insures all private passenger, farm and utility vehicles owned by the named insured on the date of such acquisition and the named insured notifies the company within 30 days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile . . . .[93]

The automobile described in the policy became inoperable because of mechanical failure and the insured bought another 1961 Chevrolet automobile. The original insured automobile remained in the insured's possession, "jacked up on some cinder blocks" and without tires at his home.[94] The second Chevrolet also became inoperable because of mechanical failure and the insured purchased a third 1961 Chevrolet.

The third Chevrolet was involved in an accident when the insured struck a pedestrian whose insurance company subsequently brought an action to determine whether it was liable under the uninsured motorist provisions of its policy or whether

92. The court merely noted that "[t]he finding of the trial judge that the Ford Falcon, purchased . . . to replace the inoperable Chevrolet Camaro, is fully sustained by the evidence." 262 S.C. at 598, 201 S.E.2d at 744.

93. Brief for Appellant at Appendix, Allstate Ins. Co. v. Government Employees Ins. Co., 262 S.C. 110, 202 S.E.2d 640 (1974).

94. 262 S.C. at 115, 202 S.E.2d at 642.

Government Employees' replacement provisions covered the operation of insured's third Chevrolet.[95] The trial court ruled that both the second and third Chevrolets were replacement vehicles and held the insurer liable under its replacement provisions. The lower court relied upon the Fourth Circuit's interpretation of South Carolina law to define "replacement vehicle" in broad terms:

> The replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period and it must replace the car described in the policy, which must be disposed of *or be incapable of further service at the time of replacement.*[96]

In applying this definition to the facts in the present case, the trial court cited with approval the "landmark decision in this area"[97] of the New Hampshire Supreme Court in *Merchant Mutual Casualty Co. v. Lambert.*[98] In *Lambert* the court held that a new car was a replacement vehicle where the insured retained possession of the named automobile in his garage for several months because it was worn out and unfit to be driven.

During the appeal from the trial court's decision, the insurer pointed to testimony of the insured that he intended to repair the original Chevrolet automobile.[99] Consequently, the company maintained that affirmance of the trial court would "allow an insured to have double coverage while only paying one premium, and this clearly would be a windfall for the insured."[100] The supreme court affirmed the holding of the trial court and added that

95. To complicate the issues further, the insured had notified the company of the purchases of the second and third Chevrolets. Although the evidence was not conclusive, the insured apparently considered each new purchase as a replacement vehicle but the insurer included the second car in the original policy. Prior to the date of the accident, the insurer had cancelled the insured's policy for failure to pay an "additional coverage" premium on the second Chevrolet. The insured claimed no knowledge of the cancellation and the insurer readily admitted that the third Chevrolet which was involved in the accident was a replacement vehicle for the second Chevrolet; it denied, however, that the second Chevrolet replaced the first Chevrolet. *Id.* at 116, 202 S.E.2d at 643.

96. Record at 97, *citing* Fleming v. Nationwide Mut. Ins. Co., 388 F.2d 145 (4th Cir. 1967).

97. *Id.*

98. 90 N.H. 507, 11 A.2d 361 (1940).

99. The opposing insurer argued that the insured's intention to repair the original vehicle did not disqualify the subsequent replacement of the automobile and indicated that the insured's testimony reveals that any intention to repair the original automobile was abandoned when the second car was purchased. *See* note 102 *infra* and accompanying text.

100. Brief for Appellant at 20.

> [m]ere retention of title and possession of the described automobile will not prevent the attachment of replacement coverage to one subsequently acquired, where the described automobile is incapable of further service.[101]

The court noted that the record clearly indicated that once the original and second automobiles suffered mechanical failures, they were never again operated. Moreover, the court implied that any intention of the insured to repair these vehicles was abandoned because it was "reasonably inferrable that the same model vehicles were purchased so that parts could be taken from the inoperable one to keep the replacement operating."[102]

The intent to repair the original Chevrolet automobile was of great concern to the insurer because of its unusual replacement provision which automatically extended coverage to replacement vehicles without any requirement of notice.[103] The insurer feared that an insured who had obtained an additional automobile would be permitted

> to crystallize to . . . [his] own advantage an intention which up to the time of the accident had been embryonic and perhaps never communicated to another party. If allowed, the insurance company would in effect be covering two cars in one policy with the enhanced possibility of liability.[104]

Since this fear is largely attributable to the poor draftsmanship of its own policy provision, the insurer has the ability to correct its error in subsequent policies.[105] Additionally, the insurer's fear

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101. 262 S.C. at 115, 202 S.E.2d at 642. *See* Fleming v. Nationwide Mut. Ins. Co., 383 F.2d 145 (4th Cir. 1967); State Farm Mut. Auto. Ins. Co. v. Shaffer, 250 N.C. 45, 108 S.E.2d 49 (1959). The court distinguished its former decision in Miller v. Stuyvesant Ins. Co., 242 S.C. 322, 130 S.E.2d 913 (1963), which involved the transfer of an insured vehicle from a husband to his wife. The court felt that the subsequent purchase of another car by the husband was not a replacement vehicle because it was still operative and within the possession and ownership of the husband as a member of his wife's household. *See also* Mitcham v. Travelers Indem. Co., 127 F.2d 27 (4th Cir. 1942) (replacement coverage not extended where insured purchased a new car and left the original vehicle with an automobile dealer to be stored and sold since a lien prevented the outright transfer of title to the automobile dealer); Yenowine v. State Farm Mut. Auto. Ins. Co., 342 F.2d 957 (6th Cir. 1965) (replacement coverage denied where insured transferred the named vehicle to her son but continued to operate the original and new vehicles).

102. 262 S.C. at 115, 202 S.E.2d at 642-43. *See* note 99 *supra*.

103. *See* note 93 *supra* and accompanying text.

104. Brief for Appellant at 15, *quoting* Kelly v. State Farm Mut. Ins. Co., 256 F. Supp. 978, 981 (E.D. Tenn. 1966).

105. *See* note 86 *supra*. Merely because the terms of its own policy may be unfavora-

is ungrounded; an insured would gain no benefit by virtue of possession of an automobile which is incapable of service and the insurer's risk of an inoperative automobile being involved in an accident is remote. If an original automobile were repaired and made operative, courts would probably be inclined to limit coverage either solely to the replacement vehicle or to the original vehicle, depending on the facts of the particular case.[106]

B. *Change of Interest or Ownership*

In *Chrysler Credit Corp. v. State Farm Mutual Automobile Insurance Co.*[107] the South Carolina Supreme Court, in a case of first impression, determined that a lienholder's repossession of an automobile did not constitute a change of interest or ownership in the automobile sufficient to require notice to the insurer.[108] A consumer, John Davis, was a named insured under a policy issued by State Farm which insured an automobile purchased from a Seneca, South Carolina dealer. Davis had financed his purchase through a retail installment contract which the dealer had sold to Chrysler Credit. The policy, naming Chrysler Credit as lienholder and loss payee, contained State Farm's standard lienholder provision which required Chrysler Credit to notify the insurer within ten days of any change of interest or ownership if the policy were to remain in full effect.[109]

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ble to the insurer, the court has little reason to interpret such provision adverse to the party who did not intend to have more than one vehicle insured.

106. If the original automobile were repaired, it probably could not be classified as a replacement vehicle although, if title is not in the insured, it may be classified as a temporary substitute vehicle. In Fleming v. Nationwide Mut. Ins. Co., 383 F.2d 145, 149 (4th Cir. 1967), the court indicated that the insurer's fears of double coverage have not yet been realized under the application of the rule adopted in *Allstate*: "We have been referred to no case holding that an insured may own and operate both the replaced and the replacement vehicle for more than one month and then elect, without notice to his insurer, to have the replacement occur when he disposes of the older vehicle." *See* note 101 *supra*.

107. 263 S.C. 70, 207 S.E.2d 806 (1974).

108. *Id.* at 76, 207 S.E.2d at 809.

109. The policy provision in question provided as follows:

Lienholder: If a mortgage owner, conditional vendor, or assignee is named in the exceptions, *loss*, if any, under coverage D, F, and G shall be payable to the named insured and to such additional interest as such interest may appear, and this insurance as to such additional interest shall not be invalidated by any act or negligence of the mortgagor or owner, nor by any change in title or ownership, nor by any error or inadvertence in the description of the motor vehicle until after notice of termination of the policy shall be given to such mortgage owner,

Davis defaulted in his installment payments and advised Chrysler Credit that he no longer wanted the automobile and did not intend to make further payments. The finance company thereupon requested Davis to return the automobile to the dealer. Davis returned the automobile, together with the keys and registration, on the following day. After confirming that the automobile had been returned and advising its home office, Chrysler Credit notified Davis of its intention to dispose of the automobile in 10 days at a public sale unless Davis redeemed the vehicle prior to the sale. Before the public sale occurred, the automobile was stolen from the dealer's lot. State Farm denied coverage, claiming that Chrysler Credit failed to comply with policy provisions requiring notice within 10 days of a change of interest or ownership.

In a trial without a jury, the lower court ruled that no change of interest or ownership had occurred and awarded Chrysler Credit the unpaid balance on the installment contract. In affirming the lower court, the supreme court rejected State Farm's contention that a transfer of title from debtor to lienholder constituted a change in ownership by operation of law. At one time, South Carolina courts recognized that a mortgage of personal property automatically transferred title to the property to the mortgagee.[110] Such a rule proved to be harsh and resulted in inequities; later, modification led to a new rule whereby title to mortgaged property would revert to the mortgagee or lienholder only upon default of the debtor.[111] State Farm claimed that this rule was unaffected by adoption of the Uniform Commercial Code[112] and claimed that Davis' default automatically transferred

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conditional vendor, mortgagee, or assignee stating when not less than ten days thereafter such termination shall be effective; *provided, the lienholder shall notify the company within 10 days of any change of interest or ownership which shall come to the knowledge of said lienholder and failure to do so will render this policy null and void.*

Record at 12, Chrysler Credit Corp. v. State Farm Mut. Auto. Ins. Co., 263 S.C. 70, 207 S.E.2d 806 (1974) (emphasis added).

110. *See* Levi v. Legg & Bell, 23 S.C. 282 (1885).

111. *See* Martin v. Jenkins, 51 S.C. 42, 27 S.E. 947 (1897). Despite reversion of title upon default, the mortgagor retained some rights of ownership.

After breach of the condition of a mortgage of personal property the legal title to the property mortgaged becomes vested in the mortgagee, subject only to the right of the mortgagor to redeem before sale, or, after sale, to an accounting in equity for the surplus, if any, over the debt secured by the mortgage.

Id. at 43, 27 S.E. at 948.

112. *See* S.C. CODE ANN. § 10.9-202 (Spec. Supp. 1966) (Reporter's Comments).

title to Chrysler Credit and required Chrysler Credit to notify State Farm of the subsequent change in ownership.

The court correctly viewed State Farm's construction of the term "change in ownership" as strained.[113] Since the policy provision in question had not been written in a vacuum, the court determined that the insurer should be presumed to have had knowledge of the statutory relationship between a debtor and lienholder and the legal incidents thereof. The Uniform Commercial Code,[114] which clearly governed the relationship between Davis and Chrysler Credit, clearly recognized that the issue of title to the automobile was irrelevant: "Each provision of this Title with regard to rights, obligations and remedies applies whether title to collateral is in the secured party or in the debtor."[115] Moreover, both the Code[116] and the common law[117] recognize that a mortgagee is not free to exercise absolute rights of ownership over personal property when a default occurs. Instead, ownership remains in the debtor with his right of redemption.[118]

The term "change of interest" has a much broader meaning than "change of ownership." It includes an alteration of any right, legal or equitable, in the nature of property.[119] State Farm argued that, even if no change in ownership had occurred, Chrysler Credit's possession of the automobile, subject only to Davis' right of redemption, constituted a change of interest within the meaning of the policy terms.[120] The court, however, noted that both the lienholder and the debtor retained insurable interests in the automobile and no third party interest was interjected into the insurance contract.[121] If the automobile had been stolen before default and prior to repossession, Chrysler Credit's interest in the automobile would have been identical to the interest which it was presently asserting.

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113. 263 S.C. at 76, 207 S.E.2d at 809.

114. S.C. CODE ANN. §§ 10.1-101 *et seq.* (Spec. Supp. 1966).

115. *Id.* § 10.9-202.

116. *Id.* § 10.9-504(3) (requiring reasonable notification to the debtor of the time and place of sale) and § 10.9-506 (recognizing the right of the debtor to redeem the property before sale unless otherwise agreed in writing).

117. *See* General Motors Acceptance Corp. v. Hanahan, 146 S.C. 257, 143 S.E. 820 (1928).

118. *See* note 111 *supra.*

119. *See, e.g.*, National Union Fire Ins. Co. v. Deas, 229 Ala. 477, 158 So. 323 (1935).

120. Brief for Appellant at 8.

121. 263 S.C. at 75, 207 S.E.2d at 808.

Adoption of State Farm's contention that default under a chattel mortgage or installment contract[122] constitutes an automatic change of ownership requiring notice to the insurer would lead to impractical results.

> [T]o so hold would place an intolerable burden upon financiers of automobiles and would result in the forfeiture of rights of financiers in many instances when a payment is late for a period in excess of ten days. Yet, carried to its extreme, this . . . is the position of [State Farm] . . . . [123]

In view of the impracticality of such a construction and State Farm's knowledge of the legal relationship between a debtor and lienholder, the insurer should have specified that its policy provision applied to situations of default or repossession.[124]

Chrysler Credit's possession of the automobile did not constitute a sufficient change of interest or ownership which would justify forfeiture of the policy. "[T]he obvious purpose of the required notification is to enable the insurer to determine whether the transfer has increased the hazard" to the insured property.[125] The mere transfer of possession of the automobile from Davis to Chrysler Credit did not involve an increased risk or hazard. "[T]he vehicle was taken off the road and placed on a dealer's lot . . . [where] the risks . . . were decreased as the

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122. A chattel mortgage under South Carolina common law and a conditional sales contract are functional equivalents. *See* Speizman v. Guill, 202 S.C. 498, 25 S.E.2d 731 (1943).

123. Brief for Respondent at 5-6.

124. 263 S.C. at 76, 207 S.E.2d at 809. *See* Anderson v. United States Fire Ins. Co., 57 N.D. 462, 222 N.W. 609 (1928).

125. Mutual Sav. & Loan Ass'n. v. Monarch Ins. Co. of Ohio, 248 S.C. 272, 281, 149 S.E.2d 633, 637 (1966). *But see* Phoenix Mut. Life Ins. Co. *ex rel.* First Nat'l Bank v. Aetna Life Ins. Co., 166 Tenn. 126, 128, 59 S.E.2d 517, 519 (1933):

> Again it is insisted that there is nothing to show that the conveyance complained of increased the hazard. But the mortgage clause provided for notice of a change whether the hazard was thereby increased in fact or not. A contract of insurance is a contract personal in its nature, and the insurer has the right to determine for itself whether it shall become obligated to a grantee of the assured or not.

State Farm attempted to distinguish *Mutual* because the policy provision in that case was not an absolute prohibition against a change in ownership or interest. Brief for Appellant at 9. Such a distinction is illusory because the insured premises in *Mutual* were transferred from the named insured to her husband. No increased risk or hazard was thereby incurred. Moreover, the policy terms were conditioned on any one of the three criteria: a change of ownership, a change of interest, or an increased hazard. *Phoenix*, however, is clearly distinguishable from the present case because it involved a transfer to a third party. *See* text accompanying notes 127-28 *infra*.

car was no longer being driven on the highways."[126]

Although never applied to movable personal property, similar lienholder/mortgagee clauses in fire insurance policies covering real property have been held to be separate and distinct contracts between the insurer and mortgagee.[127] Consequently, provisions dealing with a change of interest or ownership apply only to strangers to the insurance contract.[128] At the time the insurance contract was made, the insurer knew the identity of the mortgagee and passed some judgment upon the hazard of insuring that interest. In *Federal Land Bank v. Agricultural Insurance Co.*[129] the South Carolina Supreme Court indicated that a provision concerning notice of any change of interest or ownership relates to a sale to a third party and not to a foreclosure by the mortgagee.[130] The only distinction between clauses in fire insurance contracts and automobile insurance contracts is the mobility of the personal property. Since the insurer is well aware of such a distinction, the insurer should clearly indicate that a "change of ownership or interest" provision applies to mere possession or custody of the property.[131] Only when possession ripens into ownership through an actual sale and passage of title to the purchaser does a change in interest occur.[132]

126. Record at 15. State Farm argued that removal to a dealer's lot increased the risk of vandalism or theft. Brief for Appellant at 8. This argument was, however, weakened by the lack of evidence that vandalism or theft is more prevalent on a dealer's lot than in private driveways or public streets. On the other hand, common experience justifies the view that cars which remain on private lots are not subject to highway accidents.

127. Shores v. Rabon, 251 N.C. 790, 112 S.E.2d 556 (1960).

128. *Id.*

129. 172 S.C. 109, 173 S.E. 295 (1934).

130. The decision in *Federal Land Bank* was grounded on other considerations. The bank insisted on an additional clause in the insurance policy specifying that, upon a transfer of ownership to the bank, the bank would be required to notify the insurance company. Since the bank authored the provision, the court felt the bank was bound to a strict interpretation of its terms and decided the case accordingly.

131. Brief for Respondent at 6.

132. Walradt v. Phoenix Ins. Co., 136 N.Y. 375, 32 N.E. 1063 (1893); W. VANCE & B. ANDERSON, HANDBOOK ON THE LAWS OF INSURANCE 836 (3d ed. 1951). *But see* C.I.T. Corp. v. American Cent. Ins. Co., 18 Cal. App. 2d 673, 64 P.2d 742 (1937) where the California Supreme Court faced a similar factual situation. C.I.T. Corporation, an automobile financier, purchased the conditional sales contract of one Housley from a dealer. Housley had used an old truck as a down payment on the purchase price of a new truck. When it was discovered that Housley did not possess title to the used truck, C.I.T. ordered repossession of the collateral which was subsequently stolen from the dealer's lot. In allowing the insurer to prevail, the court claimed that repossession terminated the debtor's interest and altered that of the lienholder who had reassumed the risk of loss. These results, however, were controlled by the conditional sales contract which expressly terminated Housley's interest upon repossession. Since there was a breach of warranty of title, Housley's contract was cancelled and he could no longer claim any right of redemption.